SUPREME FINANCE (M) BERHAD

v.

KOO SIN KEN

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
WAN SULEIMAN SCJ
SYED AGIL BARAKBAH SCJ
[CIVIL APPEAL NO. 101 OF 1986]
15 OCTOBER 1986

CIVIL PROCEDURE: *Interest on Judgment debt - Appeal against decision of learned Judge who held that interest should be at 8% per annum from the date of judgment until the judgment is satisfied - Rules of the High Court 1980 - Order 42 r. 12 - Whether appellant entitled to interest exceeding the statutory rate of 8% per annum on the judgment debt.*

The only issue in this appeal concerned the rate of interest to be given after date of judgment. Macina Enterprise Sdn. Bhd. (the borrower) obtained a loan of RM392,000 from the appellant. As security for the loan the respondent, a Director of the borrower, charged to the appellant a piece of land. The respondent was to pay the appellant interest on the loan at the rate of 18% per annum. It was also provided that in default of the loan or interest the appellant should be entitled to agreed damages at the rate of 0.685% per day on the sum owing from the date of default until the date of payment.

The respondent failed to pay interest for the months of December 1982 to April 1983. Notice recalling the loan was given to the respondent. As on 30 April 1982 the total amount (including interest) outstanding was RM416,653.78. Consequently the respondent was ordered to show cause why his land should not be sold by public auction for the recovery of the amount due, i.e. RM416,633.28 being the principal sum including interest at the rate of 18% per annum as at 30 April 1983 together with further interest at 0.685% per day until 5 December 1983 and thereafter at 18% per annum until the date of full satisfaction.

The respondent (defendant in the High Court) contended before the learned Judge that the interest as provided for by the agreement at 18% per annum should only be chargeable up to the date of judgment and that thereafter the interest should be at 8% per annum. The learned Judge agreed with the defendant and ordered that interest should be at 8% per annum from the date of judgment until the judgment is satisfied.

The appellant appealed to the Supreme Court, contending that the learned Judge was wrong in law.

Held:

[1] Under O. 42 r. 12 the interest will be at the rate of 8% per annum or such other rate not exceeding 8% per annum as the Court directs from the date of judgment until satisfaction. Order 42 r. 12 makes no distinction between debts in respect of which the parties have made an agreement in respect of interest and those where there is no such agreement.

[2] The Courts have no power to award interest above the statutory rate of 8% per annum as prescribed under O. 42 r. 12. Section 16 of the Courts of Judicature Act 1964 is an enabling provision giving power to the Rules Committee to make rules relating to various matters. As to interest the Rules Committee has by O. 42 r. 12 prescribed interest for judgment debt at maximum rate of 8% per annum.

[3] The appellant is not entitled to interest on the judgment debt exceeding the statutory rate of 8% per annum under O. 42 r. 12. So Their Lordships saw no reason to interfere with the decision of the learned Judge.

[Appeal dismissed with costs.]

Cases referred to:

American International Assurance Co. Ltd. v. Union Builders (Malaysia) Sdn. Bhd. [1973] 1 MLJ 95
Ex parte Fewings [1888] 25 Ch D 338
Economic Life Assurance Society v. Usborne [1902] AC 147
Public Bank Berhad v. Hara Industries Sdn. Bhd & Anor. [1987] CLJ (Rep) 842
Sim Lim Finance Ltd. v. Pelandok Enterprise Pte. Ltd. & Anor. [1981] 1 MLJ 280

For the appellant - Loh Siew Cheang of M/s. Joseph Tan & Tang
For the respondent - Loh Yew Dong of M/s. Loh Yew Dong & Co.

[Editor's Note: The judgment of V.C. George J *Public Bank Berhad v. Hara Industries Sdn. Bhd. & Anor.* mentioned in this judgment is reported in this issue of the CLJ (Rep) at p. 842]

JUDGMENT

Lee Hun Hoe CJ (Borneo):

We dismissed the appeal and stated we would give our reasons later. We do so now.

The only issue in the appeal concerned the rate of interest to be given after date of judgment. The facts were not in dispute. Briefly, Macina Enterprise Sdn. Bhd. (the borrower) obtained a loan of RM392,000 from the appellant. As security for the loan the respondent, a director of the borrower, charged to the appellant a piece of land described as CT. No. 9408 Lot No. 78-N in the Town of Ipoh (the land). The respondent was to pay the appellant interest on the loan at the rate of 18% per annum. It was also provided that in default of the loan or interest the appellant should be entitled to agreed damages at the rate of 0.685% per day on the sum owing from the date of default until the date of payment. The respondent failed to pay interest for the months of December 1982 to April 1983. Notice recalling the loan was given to the respondent. On 29 June 1983 the appellant sent the respondent the statutory notice in Form 16E pursuant to s. 255 of the National Land Code. As on 30 April 1983 the total amount (including interest) outstanding was RM416,653.78. Consequently, the respondent was ordered to show cause why his land should not be sold by public auction for the recovery of the amount due, that is, RM416,633.28 being the principal sum including interest at the rate of 18%per annum as at 30 April 1983 together with further interest at 0.685% per day until 5 December 1983 and thereafter at 18% per annum until the date of full satisfaction.

In his grounds of judgment the learned Judge stated:

> The defendant claims that the interest as provided for by the agreement at 18% per annum should only be chargeable up to the date of judgment. Thereafter the interest should be at 8% per annum.
>
> I agree with the defendant. Interest should be at 8% per annum from the date of judgment until the judgment is satisfied. Order 42 r.12 clearly provides that every judgment debt shall carry interest at the rate net exceeding 8% per annum from the date of judgment. The interest chargeable before and up to the date of judgment could however be at the rate specified in the agreement.

The appellant contended that the learned Judge was wrong in law. He made two submissions. First, what he called the broader approach, that is, s. 16(1) of the Courts of Judicature Act 1964 preserves the contractual rights and does not confer power upon the Rules Committee to interfere with private rights of the parties acquired under contracts. In other words, s. 6(1) allows for contractual interest rates to be chargeable on a judgment sum. Secondly, the narrower approach, that is, the merger doctrine has no application to the present case. However, during the hearing the appellant abandoned the broader approach. For the narrow approach he relied on the case of *American International Assurance Co. Ltd. v. Union Builders (Malaysia) Sdn. Bhd.* [1973] 1 MLJ 95. There the appellants were the chargees of certain lands on the security of which the respondents were given a loan of RM1,250,000 bearing interest at 11% per annum. The respondents defaulted in payment of a number of instalments. An order for sale of the lands was made by the High Court to recover the sum of RM1,401,596.24 due to the appellants as on 31 August 1970 together with interest at 11% per annum from 1 September 1970 to date of order and further interest at 6% per annum to date of payment or realization. The appellants appealed against the order of the High Court in so far as it related to the payment of interest at 6% from the date of the order. They claimed interest at 11% per annum until the date of realization of the security. In allowing the appeal the Federal Court held that as the appellants' claim as chargees in this case was not on the covenant but in the exercise of their statutory remedy against a chargor in default there could not be any merger in the judgment and the appellants were therefore entitled to the interest at the agreed rate, that is, 11% until realization of the security.

The Federal Court apparently disapproved the award of the lesser interest from the date of the order by the learned Judge because he chose to follow *Ex parte Fewings* [1888] 25 Ch.D. 338 @ 355 where Fry LJ stated:

> When there is a covenant for the payment of a principal sum and a judgment has been obtained upon the covenant for that sum, it is plain that the covenant is merged in the judgment, and, if there is a covenant to pay interest which is merely incidental to the covenant to pay the principal debt, that covenant also is merged in a judgment on the covenant to pay the principal debt. Of course a covenant to pay interest may be so expressed as not to merge in a judgment for the principal; for instance, if it was a covenant to pay interest so long as any part of the principal should remain due either on the covenant or on a judgment.

The above passage was quoted with approval by the Earl of Halsbury LC in *Economic Life Assurance Society v. Usborne* [1902] AC 147 @ 149. Ong CJ (Malaya) in his judgment in the *American International Assurance case* was critical of the above passage for he thought that it did not, perhaps, sufficiently clarify the distinction between a debt and a claim upon a mortgage. In all the cases referred to the question of statutory rate of interest was never discussed. Order 42 r.12 reads:

> 12. Every judgment debt shall carry interest at the rate of 8 per centum per annum or at such other rate not exceeding the rate aforesaid as the Court directs, such interest to be calculated from the date of judgment until the judgment is satisfied.

There is no equivalent English rule. The question is whether the debt merged in the judgment. Clearly, where a judgment is recovered in respect of debt any other personal remedy for the same debt is extinguished or merged in the judgment. In which case under O.42 r.12 the interest will be at the rate of 8% per annum or such other rate not exceeding 8% per annum as the Court directs from the date of judgment until satisfaction. Order 42 r.12 makes no distinction between debts in respect of which the parties have made an agreement in respect of interest and those where there is no such agreement. Bearing in mind that, after judgment,

the judgment creditor enjoys the privilege of having the assistance of the Courts in enforcing the judgment or he may initiate bankruptcy proceedings. Without obtaining judgment a judgment creditor cannot do either of these.

It is interesting to note that the question of rate of interest was discussed in some details by V.C. George J in the unreported case of *Public Bank Berhad v. Hara Industries Sdn. Bhd. & Anor*. [1987] CLJ (Rep) 842. An instructive case is *Sim Lim Finance Ltd. v. Pelandok Enterprise Pte. Ltd & Anor.* [1981] 1 MLJ 280 where Wee Chong Jin CJ (Singapore) has to construe O. 42 r. 12 of the Rules of the Supreme Court which is word for word the same as our O. 42 r. 12. In that case the plaintiffs sued the defendants for monies advanced to the first defendant under mortgage. They applied for leave to enter judgment under O. 83 r. 4 against the first defendant in default of appearance for RM1,755,691.90 and interest at the rate of RM1,024.14 per day from 1 October 1980 until payment. The Registrar heard the application and entered judgment for the sums claimed and interest at the rate claimed from 1 October 1980 until the date of judgment and thereafter at 8% per annum. The appellants appealed claiming that they were entitled to interest at the rate claimed until payment. In dismissing the appeal Wee Chong Jin CJ (Singapore) held that although the plaintiffs were entitled to retain their security until they were paid the principal sum and interest at 18% per annum (the covenanted rate) they were not entitled under the present application for leave to enter judgment in default of appearance to interest on the judgment debt exceeding the statutory rate of 8% per annum prescribed under O. 42 r. 12. Has the Courts power to award interest above the statutory rate of 8% per annum as prescribed under O. 42 r. 12? Section 16 of the Courts of Judicature Act 1964 is an enabling provision giving power to the Rules Committee to make rules relating to various matters. As to interest the Rules Committee has by O. 42 r. 12 prescribed interest for judgment debt at maximum rate of 8% per annum.

We are also of the view that the appellants are entitled to retain their security until they were paid the principal sum and specified rates of interest up to the date of judgment but they were not entitled to interest on the judgment debt exceeding the statutory rate of 8% per annum under O. 42 r. 12. We see no reason to interfere with the decision of the learned Judge. Hence we dismissed the appeal with costs.

Also found at [1987] 1 CLJ 374